Supreme Court, U.S.
FILED
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91-58

No. 90 -

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDWARD FRANCIS SKLODOWSKI, JR.,
Administrator of the Estate of
Edward Francis Sklodowski, III, Deceased,

Petitoner,
v.

SCOTT PAPER CO.

v.

ISAAC WATKINS COMPANY, INC.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

STANLEY B. GRUBER
FREEDMAN AND LORRY, P.C.
Suite 900, 400 Market St.
Philadelphia, Pa. 19106
(215) 925-8400
Attorneys for Petitioner

QUESTION PRESENTED

Did the Court of Appeals carry out its duty to provide meaningful *de novo* review of the District Court's determination of state law when it affirmed the District Court's Judgment, without oral argument, by means of a Judgment Order which stated:

> "After consideration of all contentions raised by the appellant, it is
>
> ADJUDGED AND ORDERED that the Judgment of the District Court be and is hereby affirmed."

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No. 90 -

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ISAAC WATKINS COMPANY, INC.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

Petetioner, Edward Francis Sklodowski, Jr., Administrator of the Estate of Edward Francis Sklodowski, III, Deceased, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit in the within matter, and in support thereof represents as follows.

OPINIONS BELOW

The Court of Appeals did not render an opinion in this case. The Judgment Order of the Court of Appeals dated March 19, 1991 is reproduced in the Appendix hereto at page 1a. The Order of the Court of Appeals denying the Petition for Rehearing is reproduced in the Appendix hereto at page 3a. The unreported Memorandum and Order of the District Court dated September 6, 1990 is reproduced in the Appendix hereto at page 4a.

JURISDICTION

The Judgment of the Court of Appeals was entered on March 19, 1991. The Order of the Court of Appeals denying the Petition for Rehearing was entered on April 11, 1991.

This Petition is being filed within ninety (90) days of the entry of the Order denying the Petition for Rehearing.

The jurisdiction of this Court to review the Judgment in question by Writ of Certiorari is invoked under 28 U.S.C. Section 1254 (1).

STATUTE

This case involves an interpretation of the Pennsylvania Workmen's Compensation Act and specifically Pa. Stat. Ann. Tit. 77, §§ 21 and 481 (a) which provide:

> "Section 21. The term "employer", as used in this Act, is declared to be synonymous with master, and to include natural persons, partnerships, joint-stock companies, corporations for profit, corporations not for profit, municipal corporations, the Commonwealth, and all governmental agencies created by it.

> Section 481 (a). The liability of an employer under this Act shall be exclusive and in place of any and all other liability to such employees, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death. . ."

STATEMENT OF THE CASE

This action arose out of the death of 17 year old Edward Francis Sklodowski, III on June 23, 1988 when he was electrocuted on his fourth day on the job at the premises of respondent Scott Paper Company ("Scott") in Tinicum Township, Pennsylvania. Edward Francis Sklodowski, Jr., as Administrator of the estate of his son, Edward Francis Sklodowski, III, brought this action under the diversity jurisdiction of the District Court, 28 U.S.C. Sec. 1332, seeking compensatory and punitive damages under state law as a result of the alleged willful, reckless and/or negligent conduct of Scott which resulted in the death of young Mr. Sklodowski.

Following the filing of the Complaint, Scott brought a third-party complaint against Isaac Watkin Company, Inc. ("IWCO"), the company which had furnished the decedent to Scott through a contractual arrangement in the capacity of "helper".

After the taking of extensive discovery by all parties, Scott moved for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The sole basis for Scott's Motion was its contention that the decedent was its "borrowed employee" under the law of the Commonwealth of Pennsylvania and that, accordingly, it was immune from suit under the Pennsylvania Worker's Compensation Act, Pa. Stat. Ann. Tit. 77 Sec. 481 (Purdon Supp. 1990).

The record before the District Court on Motion for Summary Judgment consisted primarily of the transcripts of depositions taken during discovery and the documents adduced at such depositions.

It was the position of the petitioner Sklodowski that when viewing the evidence bearing on the "borrowed employee" defense, and all the inferences reasonably to be drawn therefrom, in a light most favorable to the petitioner, there was evidence which, if believed by the jury, would be sufficient under the law of the Commonwealth of Pennsylvania to defeat any or all of the elements necessary for Scott to establish such a defense.

Specifically, petitioner argued that the "right of control" test, utilized under Pennsylvania law to determine the applicability of the "borrowed employee" defense, requires a threshold consideration as to whether the contract which created the alleged borrowing arrangement permitted the assignment of the employee to the work he was performing at the time of his injury or death.

The District Court rejected petitioner's contentions at footnote 6 of its Memorandum and Order as follows: (8a)

> "Plaintiff's counsel has not cited any cases, nor have we found any, to support his argument that the right-of-control test requires a threshold analysis of the contract between IWCO and Scott, the purpose for which IWCO labor was sought, and the consequent propriety of Scott assigning Sklodowski to remove the light switch. Plaintiff's formulation of the standard focuses incorrectly upon defendant's negligence, not defendant's ability to

control."[1]

Petitioner also argued that under Pennsylvania law the "right-of-control" must be "*meaningful*" and cannot exist unless the alleged "borrowing employer" employs personnel with sufficient skills and competence to meaningfully direct the alleged "borrowed employee" in the work to be done. The District Court found that since the decedent worked as a helper, a position that required minimal expertise, Scott "could have shown plaintiff how to perform his assigned task." (11a) However, the point of petitioner's argument was that Scott had in fact improperly assigned young Mr. Sklodowski to electrician's work as opposed to helper's work and that Scott did not employ supervisory personnel who possessed the necessary expertise to supervise this type of electrical work.

On appeal, the United States Court of Appeals for the Third Circuit did not hear oral argument and did not issue an opinion. Instead, it issued a Judgment Order which read as follows:

> "After consideration of all contentions raised by the appellant, it is
>
> ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed."

Petitioner Sklodowski then filed a Petition for Rehearing on the ground that the Judgment Order issued by the Court of Appeals did not meet the meaningful *de novo* review of a District Court's determination of state law as

---

1. Contrary to the District Court's statement that plaintiff's counsel had not cited any cases in support of his position regarding the right of control test, plaintiff did in fact cite numerous authorities including *Tar v. Hecla Coal & Coke Co.*, 265 Pa. 519, 522 (1920); *Robson v. Morton*, 291 Pa 426, 431, 140 A.2d 339 (1928); *Mature v. Angelo*, 373 Pa. 593, 595, 97 A.2d 596 (1953).

required by this Court's decision in *Salve Regina College v. Russell*, 499 U.S. , 111 S. Ct. 1217, 113 L. Ed. 2d 1190 (1991). The Petition for Rehearing was denied by the Court of Appeals.

REASON FOR GRANTING THE WRIT

THE JUDGMENT ORDER ISSUED BY THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S RULING IN *SALVE REGINA COLLEGE V. RUSSELL*, 499 U.S. _____, 113 L. ED. 2D 190, 111 S. CT. 1217 (1991)

In *Salve Regina College v. Russell*, 499 U.S. ____, 113 L. Ed. 2d 190, 111 St. Ct. 1211 (1991) this Court held that "a court of appeals should review de novo a district court's determination of state law", as opposed to employing a rule of deference to a district court's interpretation of the law of the state in which it sits.

Several reasons were advanced by the Court in support of this holding, including an analysis of how independent appellate review is best suited to bring about the "reflective dialogue and collective judgment" best suited to the resolution of complicated legal questions. In addition, this Court expressed the need to encourage district courts to carefully explain the bases of its legal conclusions in cases involving application of state law. Thus, this Court noted (113 L. Ed. 2d at 199):

> "Independent appellate review necessarily entails a careful consideration of the district court's legal analysis, and an efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review. . . . Any expertise possessed by the district court will inform the structure and content of its conclusions of law and thereby become evident to the reviewing court. If the Court of Appeals finds that the district court's

analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion. Independent review, however, does not admit of unreflective reliance on a lower court's inarticulable intuitions. *Thus, an appropriately respectful application of de novo review should encourage a district court to explicate with care the basis for its legal conclusions.*" (Emphasis supplied)

The Internal Operating Procedures of the Third Circuit (Chapter 6) provide that the case may be terminated by a Judgment Order upon the unanimous decision of the panel. The criteria enumerated for use of a Judgment Order include the following circumstances (IOP 6.2.2):

"6.2.2 A Judgment Order may be used when:

(a) The Judgment of the district court is based on finding of fact which are not clearly erroneous;

(b) Sufficient evidence supports a jury verdict;

(c) Substantial evidence on the record as a whole supports a decision or order of an administrative agency;

(d) No error of law appears;

(e) The district court did not abuse its discretion on matters addressed thereto; or

(f) The Court has no jurisdiction."

However, the use of the Judgment Order procedure does not provide adequate assurance that the meaningful de novo review mandated in *Salve Regina College* is accomplished. Litigants have no way of knowing whether a Court of Appeals has, in fact, brought to bear the "careful consideration of the district court's legal analysis" inherent in such

review - or whether the Judgment Order is a result of "unreflective reliance" on the district court's opinion. It is recognized that the Judgment Order procedure undoubtedly serves to ease the burden of appellate judges dealing with crowded dockets. However, it is respectfully submitted that the benefits gained by easing such judicial burden are outweighed, at least in cases involving determination of state law, by the need to demonstrably provide "meaningful" de novo review.[2]

Moreover, the use of a Judgment Order procedure cannot serve to encourage district courts to bring the careful and reasoned analysis to bear which is required in the determination of questions of interpretation of state law.

This case deals with the electrocution death of a 17 year old. It also involves important questions of state law in the Commonwealth of Pennsylvania regarding the application of the "borrowed employee" defense - a defense which immunizes a tort- feasor from liability, no matter how egregious its conduct. The petitioner in this case is entitled to the meaningful de novo review of these questions required by this Court's decision in *Salve Regina College*.

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2. Unfortunately, the Judgment Order process, coupled with lack of appellate argument, enables a Court of Appeals to in effect create a system similar to the certiorari process. Such powers have not been conferred upon Courts of Appeals by statute or otherwise.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted for the purpose of considering whether the case should be remanded to the Court of Appeals in order to comply with this Court's requirement of meaningful de novo review.

Respectfully submitted,

STANLEY B. GRUBER
FREEDMAN AND LORRY, P.C.
Suite 900, 400 Market St.
Philadelphia, Pa. 19106
(215) 925-8400

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1690

EDWARD FRANCIS SKLODOWSKI, JR.,
Administrator of the Estate of
Edward Francis Sklodowski, III, Deceased,

v.

SCOTT PAPER CO.

v.

ISAAC WATKINS COMPANY, INC.

Edward Francis Sklodowski, Jr.,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 89-05177)
District Judge: Honorable Franklin S. Van Antwerpen

Submitted Under Third Circuit Rule 12(6)
March 11, 1991

Before: MANSMANN, HUTCHINSON and WEIS, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

_____
Circuit Judge

ATTEST:

_____
Clerk

DATED: March 19, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1690

EDWARD FRANCIS SKLODOWSKI, JR., etc.

vs.

SCOTT PAPER CO., et al.

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALTO and
WEIS, Circuit Judger.

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

Carol Los Mansmann
Circuit Judge

DATED: June 5, 1990

*Senior Circuit Judge Weis voted only as to panel rehearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD FRANCIS SKLODOWSKI, JR.
Administrator of the Estate of
EDWARD FRANCIS SKLODOWSKI, III, Deceased

v.

SCOTT PAPER CO.

v.

ISAAC WATKINS COMPANY, INC.

Civil Action No. 89-5177

MEMORANDUM AND ORDER

VAN ANTWERPEN, J. SEPTEMBER 6, 1990

This diversity action arises out of the electrocution of Edward F. Sklodowski, III, plaintiff's decedent, ("Sklodowski") while working at defendant's office building.[1] Defendant Scott Paper Company ("Scott") has moved for summary judgment claiming immunity from suit under the PennsylvaniaWorkmen's Compensation Act. The court heard oral argument on August 30, 1990, as to whether Scott was Sklodowski's employer for purposes of the act. For the reasons stated below, we grant defendant's motion.

---

1. The court notes jurisdiction under 28 U.S.C. § 1332.

The court shall render summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law.[2] Id. at 248, 106 S.Ct. at 2510. All inferences must be drawn and all doubts resolved in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962); *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir. 1985).

On motion for summary judgment, the moving party bears the initial burden of identifying for the court those portions of the record that it believes demonstrate the absence of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). To defeat summary judgment, the non-moving party -- plaintiff, in this case -- must respond with facts of record that contradict the facts identified by the movant, and may not rest on mere denials. Id. at 321 n.3, 106 S.Ct. at 2552 n.3 (quoting Fed.R.Civ.P. 56(e)); *see First National Bank of Pennsylvania v. Lincoln National Life Insurance Co.*, 824 F.2d 277, 282 (3d Cir. 1987). The non-moving party must demonstrate the existence of evidence that would support a jury finding in its favor. *See Anderson*, 477 U.S. at 248-49, 106 S.Ct. at 2510-11.

The following facts are undisputed. On April 23, 1987, Scott decided to supplement its own electrical crew and entered into an agreement with Isaac Watkins Co., Inc. ("IWCO"), an electrical contractor, who provided Scott with electricians and

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2. Pennsylvania law dictates the court's decision in this case. *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

helpers.[3] Sklodowski was one of the helpers IWCO furnished to Scott. The position of helper required no special training, and IWCO did not train or test any of its employees. (Plaintiff's Answer to Motion for Summary Judgment at ¶¶ 5, 7).

No IWCO personnel supervised the IWCO employees at the Scott jobsite. *Id.* at ¶ 9. Indeed, IWCO was not aware of the actual jobs to which its helpers were assigned, and had not discussed the Scott assignment with Sklodowski. *Id.* at ¶¶ 13, 19. IWCO relied on Scott to instruct IWCO personnel regarding any possible work-related dangers. *Id.* at ¶ 15.

On June 23, 1988, Sklodowski and two other helpers reported to work at Scott and received their job assignments from one of Scott's employees, Edward Lafferty. Lafferty took Sklodowski to the sixth floor of the Scott Plaza II Office Building and showed him a light switch that needed to be taken out. Lafferty told Sklodowski there were junction boxes above the ceiling tile from which wires would have to be removed. He did not specifically instruct Sklodowski on how to disconnect the hot wires. After asking Sklodowski if he had any problem with the assignment and allegedly receiving a negative response, Lafferty left Sklodowski alone. Twenty minutes later, Sklodowski was fatally electrocuted.

Plaintiff Edward F. Sklodowski, Jr., as administrator of his son's estate, instituted this negligence action against Scott

---

3. The timeframe specified in the purchase order embodying Scott's and IWCO's agreement was May 1, 1987, through April 30, 1988. (Defendant's Brief, Exhibit A) On April 17, 1988, IWCO requested an increase in the hourly rates stated in the purchase order. No new purchase order was drafted, but Scott began paying IWCO at the new rates. Neither side disputes that their agreement was in effect at the time of Sklodowski's injury on June 23, 1988.

Under the terms of the purchase order agreement, Scott had the right to impose additional safety standards upon IWCO personnel, and IWCo needed Scott's approval to remove IWCO personnel from defendant's worksite.

requesting compensatory and punitive damages. Scott contends that workmen's compensation is plaintiff's exclusive remedy.

Under the Pennsylvania Workmen's Compensation Act, employers covered by the statute are entitled to immunity from common law suits arising from work-related injuries.[4] The issue before the court on summary judgment is whether defendant is an employer for purposes of the Workmen's Compensation Act.[5]

Where the facts are not in dispute and inconsistent inferences cannot reasonably be drawn from the evidence, "the question as to who is the servant's employer is a matter for the determination of the court." *Mature v. Angelo*, 373 Pa. 593, 598, 97 A.2d 59, 61 (1953); *see also Venezia v. Philadelphia Elec. Co.*, 317 Pa. 557, 177 A. 25 (1935) (court determined who was the employer under workmen's compensation statute).

Defendant argues it was Sklodowski's employer for workmen's compensation purposes by virtue of the "borrowed employee" doctrine, an outgrowth of the common law concepts of master and servant. Under this doctrine, the "vital test" for determining whether Sklodowski was defendant's employee "is

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4. The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employes, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death. . . .

Pa. Stat. Ann. tit. 77, § 481(a) (Purdon Supp. 1990).

5. The term "employer," as used in this act, is declared to be synonymous with master, and to include natural persons, partnerships, joint-stock companies, corporations for profit, corporations not for profit, municipal corporations, the commonwealth, and all governmental agencies created by it.

Pa. Stat. Ann. tit. 77, § 21 (Purdon 1952).

whether [he was] subject to its control or right of control not only with regard to the work to be done but also with regard to [his] manner of performing it." *Venezia*, 317 Pa. at 559, 177 A. at 26. The Pennsylvania Supreme Court later made clear that the potential power to control the employee is the essence of the test, noting an employer was "the person who has the *right* of controlling the manner of his[a servant's] performance of the work, irrespective of whether he actually exercises that control or not." *Mature*, 373 Pa. at 596, 97 A.2d 60 (emphasis in original).[6]

While Scott may not have exercised enough control over Sklodowski's performance of his work, we find Scott had the right of controlling it, and is therefore his employer for workmen's compensation purposes. Sklodowski was a helper, not a specialist or a skilled technician. He received his assignment and minimal directions from a Scott representative. A Scott representative decided Sklodowski would work alone. Although IWCO paid Sklodowski's hourly wages and selected him for the Scott project, IWCO needed Scott's approval to remove Sklodowski once he was placed. No IWCO personnel trained Sklodowski for his assignment, and no IWCO personnel were present on the jobsite to supervise Sklodowski.[7]

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6. Plaintiff's counsel has not cited any cases, nor have we found any, to support his argument that the right-of-control test requires a threshold analysis of the contract between IWCO and Scott, the purpose for which IWcO labor was sought, and the consequent propriety of Scott assigning Sklodowski to remove the light switch. Plaintiff's formulation of the standard focuses incorrectly upon defendant's negligence, not defendant's ability to control.

7. Although plaintiff does not directly argue that IWCO was Sklodowski's employer, this must be plaintiff's position since plaintiff denies Sklodowski's employer was Scott. As the third circuit has phrased the borrowed employee question, it is "whether a plaintiff seeking a common law damage recovery for personal injuries is the servant of the employer in pursuit of whose activities he was injured, . . . or whether he remains the servant of the employer who 'loaned' him." *Williams v. Delta Truck Body Co., Inc.*, 892 F.2d 327, 327-28 (3d Cir. 1989).

More recently than the state supreme court, the Pennsylvania Superior Court persuasively applied the "borrowed employee" doctrine test in a workmen's compensation context not dissimilar to this case.[8] In *English v. Lehigh County Auth.*, 286 Pa. Super. 312, 428 A.2d 1343 (1981), the court had to decide whether the Authority or Kelly Labor, a temporary agency, was the employer of plaintiff's decedent, Thomas English. Kelly Labor had a contract with the Authority to supply labor for a sewage sampling project. After Kelly Labor placed English with the Authority, English reported to an Authority employee who directed him to the sewage metering station ten miles away and told him to take samples every half hour. English died from

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...Continued...

Scott's position that it was Sklodowski's employer is further strengthened by the uncontroverted deposition testimony of Jeffrey Watkins, IWCO's executive vice president and the person in charge of the agreement with Scott.

> Q: It's clear that somebody from Scott had the right, at least, to control or direct the manner in which the Isaac Watkin personnel performed their tasks at Scott, correct?
>
> A: To my understanding, yes.
>
> . . .
>
> Q: Did you feel it was necessary for you in any way to inspect the job site?
>
> A: I was not in control of the job sites. I had no authority.
>
> Q: Did Scott tell you that you didn't have any authority?
>
> A: No, they did not. I just assumed that.
>
> Q: Why did you assume that?
>
> A: They're working under the supervision of Scott people. They were directing what to do.

Walker Deposition at 90:1-6, 93:23-25 - 94:1-8.

8. Although we are not bound by Pennsylvania Superior Court opinions, in the absence of any indication that the highest state court would rule otherwise, decisions of intermediate appellate courts are evidence of state law and must be given significant weight. *General Elec. Credit Corp. v. Ger-Beck Mach. Co.*, 806 F.2d 1207, 1209 (3d Cir. 1986).

inhalation of noxious sewage fumes.

The court found the Authority to be English's employer, and affirmed the grant of summary judgment. 286 Pa. Super at 323, 428 A.2d at 1349. Like IWCO in the present case, Kelly Labor had no onsite personnel and did not train English for the Authority assignment. Like Scott, the Authority did not exercise much control over how the fatal assignment was performed. Emphasizing the existence of the right to control over its actual exercise, the court reasoned:

> Although it is true that the Authority did not exercise much control over the sampling project, had it chosen to, it could have exercised complete control; it could have required for instance, that anyone entering the "pit" wear a gas mask; that no more than one worker enter the pit at any one time; that the workers "phone-in" after each sampling; and that emergency air supplies be readily accessible to those who entered the pit. The fact that the Authority did not exercise such control demonstrates, not its lack of authority, but its negligence.

286 Pa. Super. at 312, 428 A.2d at 1350.

Likewise, plaintiff's argument that Scott was unaware of electrical safety regulations when it assigned Sklodowski to remove the light switch supports a finding of negligence, not one of no control.

Plaintiff contends Scott was not Sklodowski's employer because Scott did not employ "sufficiently competent supervisors as to be able to exert a 'meaningful' right of control." (Plaintiff's Brief at 32). Plaintiff relies on "meaningful" as that term was used by the third circuit in *Williams v. Delta Truck Body Co., Inc.*, 892 F.2d 327 (3d Cir. 1989). The *Williams* court reversed a grant of summary judgment to a borrowing employer who sought a highly skilled temporary computer specialist to train its employees. Weighing evidence of Williams' expertise that rendered him independent of Delta Truck's right of control, the court observed,

"This right of control must be meaningful, however, and when the skill of the employee determines that actual control cannot be exerted, a right to control is meaningless in practical terms." 892 F.2d at 330.

The holding in *Williams*, however, is inapplicable to the facts of this case. *Williams* focused on the job skills of the borrowed employee, not the supervisory abilities of the borrowing employer. In the instant case, Sklodowski worked as a helper, a position that required minimal expertise. Scott could have shown plaintiff how to perform his assigned task; Delta Truck could not have shown Williams how to run the computer program and teach its employees.

Plaintiff has not responded to Scott's motion for summary judgment with any facts of record that contradict Scott's claim of employer status under workmen's compensation. Nor has plaintiff identified a factual dispute that would affect our application of the borrowed employee doctrine under Pennsylvania law. Defendant's motion for summary judgment is therefore granted.

(2)

91-58

FILED

JUL 6 1991

OFFICE OF THE CLERK

No. 90-58

In The

Supreme Court of the United States

October Term, 1991

EDWARD FRANCIS SKLODOWSKI, JR., Administrator of the Estate of Edward Francis Sklodowski, III, Deceased,

Petitioner,

vs.

SCOTT PAPER COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PATRICK W. KITTREDGE
KITTREDGE, DONLEY, ELSON,
FULLEM & EMBICK
Attorney for Respondent
421 Chestnut Street
Fifth Floor
Philadelphia, Pennsylvania 19106
(215) 829-9900

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QUESTION PRESENTED

Whether the Court of Appeals is required to render a written opinion in order to provide a *de novo* review of the District Court's grant of summary judgment based on settled state law.

NON-WHOLLY OWNED SUBSIDIARIES

Respondent Scott Paper Company owns less than 100% of the Voting Securities of the following subsidiaries or affiliates:

Scott Iberica, S.A.

Scott Paper Company de Costa Rica, S.A.

Taiwan Scott Paper Corp.

Thai-Scott Paper Co., Ltd.

Compania Industrial de San Cristobal, S.A.

Desarrollos Dar de Mexico, S.A. de C.V.

Sanyo Scott Company, Limited

Scott Paper Limited

Ssangyong Paper Co., Ltd.

Cabin Bluff Management Co. (a partnership)

Cabin Bluff Partners (a partnership)

Canso Chemicals Limited

Forestal Colcura, S.A.

Forestal e Industrial Santa Fe, S.A.

Forestal y Agricola Monte Aguila Ltd.

Mountain Tree Farm Company

Scott Paper Company has no parent corporation.

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No. 90-58

In The

Supreme Court of the United States

October Term, 1991

EDWARD FRANCIS SKLODOWSKI, JR., Administrator of the Estate of Edward Francis Sklodowski, III, Deceased,

Petitioner,

vs.

SCOTT PAPER COMPANY,

Respondent,

vs.

ISAAC WATKINS COMPANY, INC.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT SCOTT PAPER COMPANY

The respondent Scott Paper Company respectfully requests

that this Court deny the petition for writ of certiorari to the United States Court of Appeal for the Third Circuit.

STATUTES INVOLVED

The District Court granted summary judgment in favor of respondent Scott Paper Company, which summary judgment was affirmed by the Court of Appeals, based on the following provisions of Pennsylvania's Workmen's Compensation Act, 77 Pa. S.A. §§ 21, 411(1) and 481(a):

> § 21. "Employer" defined
>
> The term "employer", as used in this act, is declared to be synonymous with master, and to include natural persons, partnerships, joint-stock companies, corporations for profit, corporations not for profit, municipal corporations, the Commonwealth, and all governmental agencies created by it.
>
> § 411. "Injury", "personal injury", and "injury arising in the course of his employment" defined
>
> (1) The terms "injury" and "personal injury," as used in this act, shall be construed to mean an injury to an employe, regardless of his previous physical condition, arising in the course of his employment and related thereto, . . . and wherever death is mentioned as a cause for compensation under this act, it shall mean only death resulting from such injury and its resultant effects, and occurring within three hundred weeks after the injury. The term "injury arising in the course of his employment," as used in this article, . . . shall

include all other injuries sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere, and shall include all injuries caused by the condition of the premises or by the operation of the employer's business or affairs thereon, sustained by the employe, who, though not so engaged, is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employe's presence thereon being required by the nature of his employment.

§ 481. Exclusiveness of remedy . . . .

(a) The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employes, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) [77 Pa. S.A. § 411(1)] . . . .

COUNTERSTATEMENT OF THE CASE

Petitioner instituted this action in the District Court under the court's diversity jurisdiction, 28 U.S.C. § 1332, seeking damages on account of the death of Edward Francis Sklodowski, III. Mr. Sklodowski was supplied to respondent Scott Paper Company ("Scott") by Isaac Watkins Company, Inc. ("IWCO") pursuant to a contract between Scott and IWCO. The purpose of this contract was to supplement Scott's manpower at one of its facilities in connection with renovations Scott was undertaking.

Mr. Sklodowski was killed while performing electrical work at Scott's facility.

After conducting some discovery, Scott filed a motion for summary judgment arguing that Scott was immune from liability to petitioner pursuant to § 481(a) of Pennsylvania's Workmen's Compensation Act, 77 Pa. S.A. § 481(a), because Mr. Sklodowski was Scott's borrowed employee, a type of employee recognized by decades of Pennsylvania case law interpreting the Act. In response, petitioner sought and was granted leave under Rule 56(f) of the Federal Rules of Civil Procedure to take four depositions. Upon completion of the depositions, petitioner responded to Scott's motion for summary judgment, submitting with his response a three-inch thick appendix containing eighteen exhibits consisting of various documentary evidence and excerpts from five depositions. Thereafter, the District Court entered summary judgment in Scott's favor. In connection with that entry, the District Court wrote a ten-page memorandum explaining the basis for its decision. That opinion is set forth in petitioner's appendix to his petition at 4a-11a.

Petitioner appealed the District Court's entry of summary judgment to the Court of Appeals. Thereafter, petitioner and Scott filed briefs. Petitioner elected not to file a reply brief although permitted to do so under Rule 28(c) of the Federal Rules of Appellate Procedure. Both petitioner and Scott stated in their briefs that the scope of the Court of Appeals' review was plenary and cited *Williams v. Delta Truck Body Co., Inc.*, 892 F.2d 327, 329-30 (3d Cir. 1989), for that proposition.

On March 19, 1991 the Court of Appeals, without holding oral argument[1], affirmed the District Court's granting Scott

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1. Rule 12(6)(a) of the Third Circuit Rules and Procedures permits a party (Cont'd)

summary judgment by entering the judgment order contained in petitioner's appendix at 1a-2a. On June 5, 1990, the Court of Appeals denied petitioner's petition for rehearing by the order set forth in petitioner's appendix at 3a.

SUMMARY OF ARGUMENT

The sole case relied upon by petitioner, *Salve Regina College v. Russell*, 499 U.S. ____, 113 L. Ed. 190, 111 S. Ct. 1217 (1991), held that a Court of Appeals may not review a District Court's determination of state law under a standard less probing than that applied to a determination of federal law. In reaching its decision, the Court rejected as inappropriate appellate deference to interpretations of state law made by federal District Court judges of that state.

In this case, there is no indication that the Court of Appeals deferred to the District Court's interpretation of state law or otherwise failed to fully review petitioner's claims on appeal. More importantly and as recognized in *Salve Regina College*, the Court of Appeals for the Third Circuit, well in advance of rendering its decision in this action, had held that District Court determinations of state law are subject to plenary review. *See Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 148 (3d Cir. 1988). Moreover, the Third Circuit Court of Appeals had also previously held that grants of summary judgment are subject to

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to an appeal to file a statement with the court setting forth reasons why he or she thinks oral argument should be heard. Petitioner filed no such statement. Rule 12(6)(a) further provides that oral argument will not be held where "the panel, after examination of the briefs and records, shall be unanimously of the opinion that oral argument is not needed". Oral argument is not needed where "the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument". *Id.*

plenary review. *See Williams v. Delta Truck Body Co.*, 892 F.2d 327, 329-30 (3d Cir. 1989). Lastly, petitioner does not persuasively argue that his petition raises any of the special and important reasons for this Court to take jurisdiction as delineated in Rule 10 of the Rules of this Court or even a reason similar to those reasons. Accordingly, petitioner's petition should be denied.

REASONS FOR DENYING THE WRIT

In his petition, petitioner argues that the disposition of his appeal by the Court of Appeals by use of a judgment order does not provide adequate assurance that it had engaged in a meaningful *de novo* review of the District Court's grant of summary judgment in Scott's favor. Such a proposition is unfounded in law and is contradicted by the Court of Appeals' previous opinions which held that (1) reviews of grants of summary judgment are plenary and (2) federal appellate courts should not defer to interpretations of state law made by federal District Court judges sitting in that state. Nor does petitioner persuasively offer any reason of the import delineated in Rule 10 of the Rules of this Court. Accordingly, the petition should be denied.

The sole case relied upon by petitioner is *Salve Regina College v. Russell*, 499 U.S. ____, 113 L. Ed. 2d 190, 111 S. Ct. 1217 (1991). In that case the only issue resolved by this Court was the following: "whether a federal court of appeals may review a district court's determination of state law under a standard less probing than that applied to a determination of federal law." 111 S. Ct. at 1219. In reaching its decision, this Court rejected as inappropriate a custom of some federal appellate courts of deferring to interpretations of state law by federal District Court judges sitting in that state. That custom had been based on the notion that federal district judges were more knowledgeable of the law of the state in which they sat and were, therefore, more apt at construing that state's law. *Id.* at 1224-25. In rendering

its decision, this Court did *not* hold that in conducting a *de novo* review of a District Court's decision based on state law the appellate court is required to render a full, written opinion.[2] Thus, the use of a judgment order[3] by the Court of Appeals does not conflict with this Court's decision in *Salve Regina College* as petitioner argues.

In this case, there is no reason to believe that the Court of Appeals deferred in any way to the District Court's determination of state law. To the contrary, the Court of Appeals had held prior to deciding this action that District Court determinations of state law are subject to plenary review by the appellate court. *See Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 148 (3d Cir. 1988). Moreover, the Court of Appeals had also previously held that grants of summary judgment are subject to plenary review as both petitioner and Scott stated in their appellate briefs. See *Williams v. Delta Truck Body Co., Inc.*, 892 F.2d 327, 329-30 (3d Cir. 1989). We must presume the Court of Appeals followed its prior opinions in this instance. The mere fact that the Court of Appeals affirmed the entry of summary judgment in Scott's favor by use of a judgment order in no way suggests that the court failed to fully review petitioner's contentions.[4] In fact, the

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2. This Court did emphasize the need to encourage the District Courts "to explicate with care the basis for its legal conclusions". 111 S. Ct. at 1222. Of course in this matter the District Court did just that in its ten-page opinion.

3. Under the Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, Chapter 6, a judgment order may be entered "when the panel unanimously determines to affirm the judgment or order of the district court . . . and determines that a written opinion will have no precedential or institutional value."

4. The Court of Appeals had before it the briefs of petitioner and Scott, the joint appendix submitted on appeal, the ten-page decision of the District Court which delineated its reasons for granting summary judgment and the filings

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judgment order explicitly states the Court of Appeals considered "all contentions raised by [petitioner]".

Nor does petitioner offer any sufficient reason which rises to the level which merits this Court's consideration of the matter. Petitioner neither persuasively invokes any of the "special and important reasons" set forth in Rule 10 of the Rules of this Court[5] nor persuasively argues any other reason which rises to that level. Accordingly, petitioner's petition should be denied.

CONCLUSION

For these reasons and based on the authorities set forth above, respondent Scott Paper Company respectfully requests that the Court deny petitioner's petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

PATRICK W. KITTREDGE
KITTREDGE, DONLEY, ELSON, FULLEM & EMBICK
Attorney for Respondent
Scott Paper Company

(Cont'd)
by both petitioner and Scott contained in the record in connection with Scott's motion for summary judgment including the three-inch submission by petitioner which included numerous exhibits and excerpts from five depositions.

5. Although petitioner argues that the Court of Appeals' entry of a judgment order conflicts with this Court's ruling in *Salve Regina College*, as discussed above, no such conflict exists.